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IN THE

Supreme Court of the United States

October Term 1935

No. 696

CHICAGO GREAT WESTERN RAILROAD COMPANY, a corporation,

Petitioner,

vs.

MARY RAMBO, as administratrix of the Estate of Roy C. Rambo, deceased,

Respondent.

BRIEF FOR RESPONDENT

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Petitioner,

vs.

MARY RAMBO, as administratrix of the Estate of Roy C. Rambo, deceased,

Respondent.

BRIEF FOR RESPONDENT

Opinion of the Court Below.

The opinion of the Supreme Court of the State of Minnesota in this matter is reported in 263 N. W. 112.

Statement of the Case.

This was an action instituted by Respondent as administratrix against Petitioner to recover damages for the wrongful death of her husband, Roy C. Rambo, (R. 1-5) who Petitioner admits was killed at 5:10 P. M. on De-

cember 8, 1933 by being run down by Train No. 8 while riding on Petitioner's tracks on a motor car and while engaged in interstate commerce (R. 14-15). Respondent alleged in her complaint that Petitioner's train was illegally operated with an insufficient, dangerous and defective headlight; that it was operated without a pilot or cow-catcher, and at an excessive rate of speed, and that Petitioner's station agent was negligent in not warning decedent or the train crew (R. 3-5).

The case was tried in the District Court of Dakota County, Minnesota, on May 23, 1934, (R. 7) and was submitted to a jury on the question of the violation of the Federal Boiler Inspection Act as to locomotive headlights (R. 210-212); particularly Rule 129 of the Interstate Commerce Commission, which requires:

> "A headlight which shall afford sufficient illumination to enable a person in the cab of such locomotive, who possesses the usual visual capacity required of locomotive enginemen, to see in a clear atmosphere, a dark object as large as a man of average size standing erect at a distance of at least 800 feet ahead and in front of such headlight . . ." (R. 219-220).

The jury returned a verdict for Respondent in the sum of $15,000.000 (R. 217). The trial court denied Petitioner's motion for judgment notwithstanding on March 4, 1935 (R. 238). Judgment was entered for Respondent and Petitioner appealed to the Supreme Court of the State of Minnesota. The appellate court affirmed the judgment on November 1, 1935, and Petitioner applied for a re-argument. Said petition was denied on November 14, 1935 and judgment was entered. Petitioner filed its petition for a Writ of Certiorari and the Writ was granted on February 17, 1936.

Decedent, Roy C. Rambo, was forty-seven years of age and was a signal maintainer in the employ of Petitioner at the time of his death (R. 8-9). He had been in Petitioner's employ for eighteen years (R. 8), and had been a signal maintainer for fifteen years (R. 8-9). His duties were to inspect and maintain Petitioner's signal lights, crossing bells, telephone and telegraph lines (R. 123-124, 159), along the territory from Empire to the West Switch at Dennison (R. 145), a distance of about thirteen miles. Randolph, where Rambo lived, and Hampton were both stations along this territory.

Petitioner supplied decedent with a motor car which he operated on the railroad tracks in the course of his duties and in returning home from work (R. 124, 159). Petitioner sent out over its telephone wires two regular lineups each day, one at 7:50 A. M. and the other at 12:50 P. M., both of which decedent secured on the day of his death in accordance with Petitioner's rules (R. 99-100, 17). Petitioner also sent to decedent numerous other rules, letters, instructions, and circulars (R. 120-122), some of which were extracted from his files and placed in evidence (R. 151-152).

On December 8, 1933, decedent went to work as usual and travelled North on Petitioner's tracks along his territory. He stopped at Hampton, repaired a crossing bell (R. 95), and travelled on North to Empire. In the afternoon he returned to Hampton. At 4:55 P. M. Petitioner's station agent at Hampton saw decedent stop in front of his station with his motor car and tinker with the motor (R. 91). The agent did not warn decedent of an oncoming train (R. 92-93). Decedent proceeded South on the tracks toward Randolph (R. 92). The station agent did not advise the train crew or the dispatcher of decedent's presence on the tracks

(R. 92-93). There is no evidence of decedent's knowledge or lack of knowledge that Train No. 8 had not passed Hampton and was coming soon.

Petitioner's Train No. 8 on that day left St. Paul at 3:37 P. M.—seven or eight minutes late (R. 29). At Rich Valley this train had an accident in which two men in a truck were killed at a crossing (R. 47). The train was delayed about 45 minutes (R. 48). The pilot or cow catcher, which was broken in this accident (R. 30), was removed, and the train proceeded South without a pilot (R. 61). The train went through Hampton going South at 5:05 P. M. (R. 94). It was due at Hampton at 4:12 P. M. and hence was fifty-three minutes late (R. 94).

It was a dark, cloudy evening. The ground was bare. The sun set at 4:30 o'clock (R. 235, 107). About two miles South of Hampton, Train No. 8 was travelling at 60 miles per hour (R. 52, 64). By his own testimony the engineer was looking ahead and first saw what appeared to be a couple of dogs about 350 to 450 feet ahead (R. 51-52). He was not able to distinguish the speeder and man until within five or six car lengths or 250 to 300 feet (R. 52, 87-88). A boy in a nearby field could not distinguish the man and the speeder until the train was within 100 feet of the speeder (R. 70, 76-78). Upon distinguishing the man and the speeder, the engineer immediately made an emergency application of brakes, blew his whistle, sanded his wheels, (R. 52, 56-57). The fireman, who was not looking out of his window, testified that the first thing he noticed was the noise of the train wheels grinding over the speeder (R. 39-40). He also testified that this noise, a flash of light, the whistle, and the emergency application of brakes all appeared to come together (R. 44). The boy estimated that

the train was 50 feet from the speeder when the whistle blew and a rod away when the sparks flew from the wheels (R. 79, 70-71).

The train travelled 2,327 feet from *the point where it first hit the speeder* to the point where it came to a stop (R. 86, 154). In two subsequent tests the same train, with the same equipment throughout and the same engineer, travelling at an estimated speed of 60 miles per hour and at a clocked speed of 61 miles per hour, stopped in 2210 feet and 2170 feet respectively from *the point at which the engineer was flagged* (R. 182-184, 188-189), the engineer applying the brakes in the same manner as at the time of the accident (R. 60).

Decedent was sitting upright on the seat of his speeder looking forward and did not look back (R. 53). This seat was about as high as a man's hips (R. 19). The speeder motor made a considerable amount of noise (R. 93-94, 101-102), sufficient to drown out the noise of an overtaking train (R. 103). The operator of a speeder such as decedent was riding can easily throw his legs to the right and drop off to the side of the track while the speeder is in motion (R. 102-103, 19). Decedent was a spry, active and healthy man (R. 90-91).

No question was raised as to the amount of the verdict.

ARGUMENT.

Summary of Argument.

Petitioner contends in its Brief: (1) that there was no evidence to sustain the finding of a violation of the Federal Boiler Inspection Act; (2) that even if it be granted that there was sufficient evidence to sustain a finding of such violation, the violation was not the proximate cause of the accident; (3) that the negligence of decedent was the sole proximate cause of his death and therefore constituted a complete defense; and (4) that the case at bar falls within the so-called "No Duty to Warn" rule as laid down by several Federal and United States Supreme Court decisions.

It is Respondent's contention:

A. That Petitioner violated the Federal Boiler Inspection Act as it applies to locomotive headlights, and that the evidence of this violation was properly submitted to the jury.

B. That the violation of the Federal act was a proximate cause of decedent's death, and that this issue was properly submitted to the jury.

C. That the negligence of decedent was not the sole proximate cause of his death and does not constitute a defense under the Federal Boiler Inspection Act.

D. That decedent was entitled to the warning which a proper headlight would have afforded him, and that the so-called "No Duty to Warn" rule urged by Petitioner is not applicable to the case at bar.

E. That the case was properly tried and submitted to a jury and that judgment of the Minnesota Supreme Court herein should be affirmed.

A.

Petitioner violated the Federal Boiler Inspection Act as it applies to locomotive headlights, and the evidence of this violation was properly submitted to the jury.

Title 45, Chapter 1, Section 23 of the United States Code Annotated provides as follows:

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb . . ."

To comply with this law the Interstate Commerce Commission, Bureau of Locomotive Inspection, has passed a rule, known as Rule No. 129, which requires each locomotive used in road service between sunset and sunrise to have a headlight which shall afford sufficient illumination to enable a person in the cab of such locomotive who possesses the usual visual capacity required of locomotive enginemen, to see in a clear atmosphere a dark object as large as a man of average size standing erect at a distance of at least 800 feet ahead and in front of such headlight (R. 220).

There is ample evidence that the headlight on Petitioner's train at the time of the fatal collision was defective and did not comply with the requirements of the Federal Boiler Inspection Act. There are, Respondent submits, five distinct portions of the evidence which prove this violation.

The first is the testimony of Petitioner's engineer. He testified that he was looking ahead (R. 53); that at a distance of seven, eight or nine car lengths he noticed what ap-

peared to be two dogs running on the track (R. 51-52), and that not until he was five or six car lengths away was he able to distinguish the man and speeder (R. 52). This would be a distance of 250 to 300 feet, as each car is 50 feet in length (R. 87). Under the engineer's direct testimony, which was clearly given and repeated (R. 56), the headlight did not comply with the legal requirement. Clearly, the speeder upon the track with the man sitting on a seat as high as a man's hips (R. 19) presented a larger object, and one more easily seen, than the statutory test of a dark object as large as a man.

Petitioner in its Brief alleges that there was nothing in the engineer's testimony to indicate that the headlight did not comply with the legal requirement because the engineer did not say how far ahead he was looking (Petitioner's Brief, pp. 9, 10 and 11).

The engineer himself testified that he was looking "straight ahead" at all times while the train was covering the three-quarters of a mile or mile of track up to the place of the accident (R. 53, 174), and that he saw something down on the track which when he first noticed it at about 350 to 450 feet he thought was a dog or two running down the track (R. 51-52). He testified that he did not distinguish the object as being a speeder with a man on it until he was some 100 or 150 feet closer (R. 52).

It is a well-known and hardly to be controverted fact that the driver of an automobile or other vehicle almost automatically keeps his eyes fixed on a point at the very outer edge of the beam thrown by his lights. This fact, when taken into consideration with the engineer's positive testimony that he was looking straight ahead at all times and that when he first saw the object he thought it was a dog or

two running down the track, clearly establishes that he was looking to the outer range of visibility—as far ahead as the light from the headlight permitted him to look.

The fact that the engineer when recalled to the stand by Petitioner after an intervening talk with Petitioner's claim agent (R. 178) stated that the distance might have been a thousand feet (R. 175) does not in any manner detract from the weight of his original testimony, particularly when it is noted that the engineer's testimony at the inquest also indicated the defective headlight (R. 207).

Petitioner also argues that the rule requiring a headlight which will reveal a man standing erect at a distance of 800 feet, assumes that both engine and man should be standing still, and that there was no proof that the moving speeder with a man sitting on it was as visible as a man standing erect on the track. (Petitioner's Brief, p. 11). This assumption is obviously erroneous and constitutes a false premise. There would be no necessity for a safety rule of any kind if trains were to remain stationary.

The second important portion of the evidence that the headlight did not meet the legal requirements, was the testimony of the farm boy, Nicholas Schaack. This young man was standing off to one side of the track in a position where this entire accident unfolded before him on the raised elevation of Petitioner's track (R. 70, Exhibit C). He testified that he first distinguished the man and the speeder when the train was within about one hundred feet of the speeder (R. 70, 76-77); that the train whistled when within fifty feet of the speeder; and that the sparks began to fly from the wheels of the train when within one rod of the speeder (R. 79-80, 70-71). His testimony was unshaken and in fact was strengthened on cross-examination (R. 76-78). He in-

dicated the relative positions on the pictures that were in evidence (R. 70, Exhibit C). These marks placed upon the pictures clearly corroborate his oral testimony when it is borne in mind that the telephone poles are about 175 feet apart (R. 157). His testimony as a whole clearly indicates that he was an observant witness testifying in a truthful, straight-forward manner. It should also be noted that he was interviewed on the morning after the accident by a claim agent of Petitioner (R. 80-81).

Petitioner contends that because the boy was off to one side of the track and because the track was on an embankment above him, his testimony that when he first saw the speeder it was about one hundred feet or so ahead of the engine does not support the finding of a defective headlight (Petitioner's Brief, p. 12). Clearly, the fact that the boy was looking at the track from an angle cannot detract from his testimony that he first saw the speeder when it was "about one hundred feet or so" ahead of the engine. In fact, the boy's being beside the track instead of in the cab of the engine afforded him a better opportunity than the engineer had to actually ascertain the distance which the light from the headlight shone down the track.

Petitioner also asserts that because the boy looked away from the track after he first saw and heard the train, his testimony that he saw the speeder in the light of the headlight when he again looked at the track, at which time the speeder was approximately only one hundred feet ahead of the train, does not constitute proof that the speeder was not discernible in the light of the headlight at a much greater distance (Petitioner's Brief, pp. 12 and 13). The boy testified that when he first looked up and saw the train he was about thirty rods or so away from it (R. 76); that he then

looked toward some cornstalks to see if there was a chicken there (R. 71) and again looked toward the track when he heard the speeder (R. 79); that he was about forty rods from the speeder when he first saw it and that it did not show up very plainly in the light of the headlight (R. 74-77). Clearly, the boy's testimony that at a distance of forty rods from the speeder he could not see it very plainly in the light of the headlight when the engine was only approximately one hundred feet behind the speeder, of itself constitutes ample evidence that the headlight was defective.

The third important portion of the evidence of the violation of the Federal Act was the testimony of the fireman. His testimony that the setting of the brakes, the toot of the whistle, the explosion when the train hit the speeder, and the grinding of the wheels of the train over the speeder, all seemed to come together (R. 44), when taken with the engineer's testimony that he (the engineer) set his emergency brake immediately upon distinguishing the man and the speeder, clearly indicates that the headlight was defective, and that the engineer did not distinguish the speeder until practically upon it.

If the engineer had seen the speeder when he was the required 800 feet away, with the speeder traveling in the same direction at approximately one-third the speed of the locomotive, the train would have travelled in excess of 1200 feet before it overtook the speeder, even assuming no reduction in the speed of the train; and at least fourteen seconds would have elapsed from the first setting of the brakes to the impact with the speeder. Clearly, if this length of time had elapsed during which the emergency brake was set, the train was slowing down and the whistle was blowing, the fireman would have had a distinct recollection of these

events prior to the impact with the speeder and the grinding of the speeder under the wheels of the locomotive. Here again, then, the testimony shows a defective headlight which prevented the engineer from distinguishing the speeder at the legal distance.

The fourth portion of the evidence that the headlight was defective is the evidence as to the brake tests subsequently made. In two carefully conducted tests with the same equipment and the same engineer applying the brakes in the same manner as at the time of the accident, the train was brought to a stop in distances of 2210 feet and 2170 feet respectively (R. 182-184, 188-189). The speed on both tests was estimated as being sixty miles an hour (R. 182-184). This was the maximum speed permitted on this track (R. 192). The point at which the engineer was flagged for these tests would correspond to the point at which he distinguished the man on the speeder. It is to be noted, however, that on the night of the accident the train traveled 2327 feet from the point of actual impact with the speeder (R. 86, 154). This clearly shows that the engineer did not distinguish the speeder until practically the moment he hit it. Conducted as carefully as they were with experts in attendance, these tests constitute very strong evidence that the headlight was defective and that the engineer did not get his "flag", that is, did not distinguish the speeder, until practically upon it.

A fifth portion of the evidence which corroborates the conclusion that the headlight was defective at the time of the collision is the fact that the decedent, an alert, active employee with a record for safety and many years of service in an exacting position for the Petitioner (R. 152-153), did not discover the approach of the train to his rear. This fact is

ground for a strong inference corroborating the other evidence that the headlight was so defective that it did not constitute any warning of the approach of the train. A locomotive headlight of legal strength, sufficient to distinguish a man 800 feet ahead, would also obviously be of sufficient strength to furnish a clear and early warning to the decedent of the approach of the train. The fact that the warning was not furnished again indicates that the light was defective.

It is respectfully submitted that any one of these five independent portions of evidence would be sufficient to make it a question of fact for the jury as to whether or not the headlight complied with the law. Taken all together, each corroborating the other, they almost conclusively prove that the headlight was so defective and so dim that the engineer was unable to see the speeder until just about as he hit it and that the boy in the field accurately saw the distances and succeeding rapid fire events.

In contradiction of this conclusion, Petitioner did not present any direct evidence that the headlight of the locomotive in question did comply with the Federal Boiler Inspection Act at the time of the accident. The only evidence produced by Petitioner was evidence from which it asks that an inference be drawn that the lights were properly maintained at the time of the collision, notwithstanding the direct positive testimony of its own engineer. The testimony of the electrician who testified that he checked these lights when the train left the roundhouse (R. 136-137), was at best merely contradictory evidence and when taken in light of the fact that a severe head-on collision had occurred prior to the accident in which decedent was killed, this testimony can have little weight.

Likewise, the testimony of the chief electrician who claimed that he happened to be riding on this particular train and checked the light immediately after the accident can at best only inferentially contradict the direct evidence of the defective light at the time of the fatal collision. When this testimony is viewed in light of the further fact that this chief electrician claimed that the headlight as the train stood upon the track after the accident shown straight down the middle of the track for 1000 feet (R. 133-134) when, in fact, the engine had stopped at the point of a curve and the headlight was obviously pointing out on the side of the track (R. 150), and in the light of the further fact that this chief electrician testified that he had examined the headlight after the first accident and that it was not then burning (R. 131) whereas both the fireman and engineer testified that it was burning after this first accident, (R. 55, 35-36), then clearly this witness' testimony may be disregarded in its entirety.

It is respectfully submitted that the question of the defectiveness of the headlight and the violation by Petitioner of the Federal Boiler Inspection Act, was properly submitted to the jury by the trial court, with full, fair and complete instructions, and that as stated by the Supreme Court of the State of Minnesota, the evidence upon this point justified the jury in finding that the headlight did not comply with the standard fixed under the Boiler Inspection Act (R. 241-246).

B.

The violation of the Federal Act was a proximate cause of decedent's death, and this issue was properly submitted to the jury.

Evidence of a causal connection between the negligence of an employer or its use of a defective appliance and the injury or death of an employee may be circumstantial. A case is made if the facts in evidence are such as to permit a fair inference that the negligence or defective appliance contributed to the injury or death.

Myers v. Pittsburgh Coal Co., (1914), 233 U. S. 184, 34 S. Ct. 559, 58 L. Ed. 906.

Gray v. Davis, (C. C. A. N. H. 1923), 294 Fed. 57.

Chesapeake & O. Ry. Co. v. Smith, (C. C. A. Ohio 1930), 42 F. (2d) 111, Cert. denied 282 U. S. 856, 51 S. Ct. 32, 75 L. Ed. 758.

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MacIntosh v. Great Northern Ry. Co., (1922), 151 Minn. 527, 188 N. W. 551.

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Anderson v. Minneapolis, St. P. & S. S. M. Ry. Co., (1923), 156 Minn. 338, 194 N. W. 762.

See *Northern Ry. Co. v. Page*, (1927), 274 U. S. 65, 47 S. Ct. 491, 71 L. Ed. 929.

See also *Swanson v. Chicago, M. & St. P. Ry. Co.*, (1924), 158 Minn. 171, 197 N. W. 275.

Nealis v. Chicago, R. I. & P. Ry. Co., (1928), 173 Minn. 587, 218 N. W. 125.

In the *Myers v. Pittsburgh Coal Co.* case, the facts disclose that decedent, a brakeman in a mine, was riding the rear car of a train of thirty or forty empty coal cars, which train was being pulled by a large electric motor car, the headlight of which had not been burning for some days. A flying switch was made, the electric motor car continuing down the main entry while the train of empty cars went down a side entry. The electric motor car then backed up and followed the train of cars into the side entry in order to distribute the cars after overtaking them. Some distance down the side entry there was a branch of a trolley system which ran into still another entry. At this point the trolley wire of the branch system passed over the tracks in the side entry at a distance of about five feet seven and one-half inches above the rails, making it necessary for a man of ordinary height riding on a car down the side entry to stoop down in order to pass under the wire. Just before decedent came to this spot he was seen signaling for the electric motor car to catch up with the train of cars. The electric motor car, proceeding down the side entry after the train of cars, ran upon an object and stopped. The object was decedent, lying in the middle of the track with his head toward the electric motor car and his cap, with the light on it still burning, lying upright beside the track. In an action for wrongful death, there was a verdict for plaintiff in the lower court. On writ of error the case was reversed by the Circuit Court of Appeals. On Writ of Certiorari the United States Supreme Court reversed the judgment of the Circuit Court of Appeals, affirmed the judgment of the Circuit

Court and remanded the case to the District Court. The Court said;

"Under the case made, the jury might well have found that the overhead wire was hung too low for the safety of the men; that there was want of adequate light at this place, and that it was negligence to run the motor car into such a place without the light which it was its duty to provide. * * *

The opinion of the Circuit Court of Appeals placed the reversal largely upon the want of definite proof as to the manner in which Myers came to his death, whether by contact with the wire, or, if so, whether that merely disabled him or he was only injured or stunned by the fall, was seized with vertigo or other sudden sickness and fell from the car for that reason, or lost his footing by some unexpected movement of the train or voluntarily got off the car and stumbled and fell upon the track, or became bewildered in the dark and mistakenly supposed himself to be in a place of safety. The court held that all these situations were more or less probable, and, in the absence of some more accurate means of ascertaining the true condition in this regard, no recovery could be had for the wrongful causing of his death, and that an examination of the testimony brought the court to the conclusion that the jury should not have been permitted to guess as to the proximate cause of death. This question, however, was submitted to the jury and found against the defendant in the trial court. *Unless the testimony was such that no recovery can be had upon the facts shown in any view which can be properly taken of them the verdict and judgment of the District Court must be affirmed.*

That there was ample testimony to carry the question of negligence to the jury we have already said, and in any case it cannot be said as a matter of law that there was no evidence tending to show that Myers came to his death by the negligence of defendant in one or more of

the ways charged in the petition. Considering the testimony, as it must be considered in determining questions of this character in appellate courts, in its most favorable aspect to the plaintiff below, we think the jury might well have found, in view of the place at which the body of Myers was found near to the wire, with his cap gone from his head, that he came in contact with that wire and was thrown to the ground, and that he survived from contact with the wire, carrying the voltage which it did, and while in this situation was run over and killed by the approaching motor car.

We think reasonable men considering the testimony adduced might well have come to this conclusion, and that it was error in the appellate court to set aside the verdict for entire absence of testimony upon this subject. In our opinion, the trial court properly left the question to the jury upon testimony which when fairly considered might sustain the verdict. See Humes v. United States, 170 U. S. 210." (Italics ours.)

In the *Chesapeake & O. Ry. Co. v. Smith* case, plaintiff, the rear brakeman on a railway train of ninety-eight empty coal cars, was riding in the caboose during a switching operation. The train came to a sudden and violent stop as a result of the application of the air brakes. Plaintiff was badly hurt and brought suit to recover for his injuries. In affirming judgment for plaintiff, the Court said:

"It is clear from the evidence of plaintiff's two witnesses that the sudden application of the air brakes was caused either by their being set by the engineer or by the breaking of the train line at the twentieth car from the caboose. * * *

If the breaking of the air line preceded the sudden setting of the brakes and caused it, then it was clearly proper for the jury, in the absence of other evidence, to infer from this alone that the injury resulted from the

company's failure to comply with the absolute duty imposed upon it by the Safety Appliance Acts. * * * And, even though plaintiff, at the time of the accident, was not engaged in an operation in which the Safety appliances are specially designed to furnish protection, the failure to comply with the acts may nevertheless be the proximate cause of the injury. Louisville & Nashville R. R. v. Layton, 243 U. S. 617, 37 S. Ct. 456, 61 L. Ed. 931; Davis v. Wolfe, 263 U. S. 239, 44 S. Ct. 64, 68 L. Ed. 284. This issue was submitted to the jury under a proper charge."

In the *Line v. Erie R. Co.* case the facts disclose that the decedent was a conductor of a freight train consisting of seventy-two or seventy-three box cars and a caboose. The air went on, stopping the train. The decedent and the head brakeman took lanterns and began an inspection, the head brakeman walking ahead. The head brakeman finding the trouble, decedent sent him up to the engine and turned as if to return to the caboose. He was not again seen a[illegible]e. The train started after several minutes. Decedent's body was found lying between the rails, with his chest crushed as if he had been rolled, and one foot cut off and the other crushed. It was found that the brake-rigging was down on one car about half way down the line. Decedent's body was found at about this point. There was some evidence that a wrench and an air hose and decedent's cap were all found nearby; also, that decedent's lattern, unlit, was found between the rails at about this point. Action was brought under the Federal Employers Liability Act and there was a directed verdict for the railroad. In reversing, the Court said:

"We think that this evidence, though circumstantial, is sufficient, if believed by the jury, to sustain a verdict

in appellant's favor. Western & Atl. R. R. Co. v. Hughes, Admx. 278 U. S. 496, 498, 49 S. Ct. 231, 73 L. Ed. 473. The evidence was more than a scintilla. Hardy-Burlingham Min. Co. v. Baker, 10 F. (2d) 277 (C. C. A. 6); Begert v. Payne, 274 F. 784, 788 (C. C. A. 6). It carried a justifiable rather than a mere possible inference (American Oil Co. v. Frederick, 47 F. (2d) 54, 57, C. C. A. 6) that when the engineer started the train the deceased was under it, and could not therefore have given the signal to proceed. * * *

Appellee introduced evidence tending to show that deceased gave the usual starting signal by lantern from the top of the train somewhere near the thirty-fifth or fortieth car from the engine, and contends that after the train started deceased fell between two of the cars to the track below.

It will be noted that this is not a serious contradiction of appellant's evidence as to the whereabouts of deceased relative to car 36 at the time he was struck, but it does contradict the inference that he was under the car when the train started. As such it is of no consequence in determining the correctness of a directed verdict. * * *

That deceased fell is only an assumption on the part of the appellee and is much weakened by the physical facts. Deceased weighed about two hundred pounds, and if in a fall his body had cleared the coupler the inference is that it would have fallen across a rail rather than between the rails and would have been mangled. We do not think that the evidence indicating that deceased gave the starting signal and fell after the train started does, as a matter of law, destroy the effect of appellant's evidence touching the defective brake rigging on car 36, the upright position of the lantern and its undamaged condition, the location and physical condition of the body and the relative location of the deceased's cap, the wrench and the air hose."

The ordinary speed of a speeder such as decedent was using at the time of the accident is twenty miles an hour (R. 101). Since decedent was traveling down grade toward home (R. 114-116) when he was hit, it is reasonable to conclude that he was traveling at about that speed. By elaborate tests which Petitioner made after the accident, the train, traveling at sixty miles an hour, was capable of being stopped in approximately 2100 to 2200 feet (R. 198). A train traveling at the rate of sixty miles an hour must travel approximately 1200 feet from a point 800 feet behind the speeder to overtake it (R. 204-205). It would take the train fourteen seconds to cover this distance. This assumes a continuous speed of sixty miles an hour on the part of the train. If the brakes were applied at the 800 foot point and the speed began to decrease, both the distance which the train would have to travel to reach the moving speeder, and the number of seconds it would take to do so, would increase.

The record is clear that the operator of a speeder such as decedent was riding on can jump off in a very few seconds if he is given any warning (R. 19, 102-103). That a proper headlight—one which will illuminate a man standing erect at a distance of 800 feet—will give a valuable warning to a man on the track of the approach of a locomotive from behind, cannot be questioned. It is common knowledge that the light from such a headlight will not only shine on the rails ahead of the man but also will illuminate the telegraph poles and wires along the right of way ahead of him. No matter in which direction he is looking he cannot fail to see the light and be warned thereby.

It is also significant to note that even though the operator remained on the speeder it would not be necessary, in order to avoid a fatal accident, for the train to be brought to a

stop before it reached the speeder, but merely that the speed of the train be slowed down to the speed of the speeder. In other words, if the engineer had been given the opportunity which the law required to set his brakes at a point 800 feet behind the speeder, the immediate decrease in the speed of the train would have increased the distance over which the train must have traveled before overtaking the speeder. If the distance increased in inverse ratio, the speed of the train would have continued to decrease so that with the speeder continuing at its same speed, the train might well have been brought to a speed of 20 miles per hour before it overtook the speeder and the collision entirely avoided. This is particularly reasonable when it is noted that at a speed of 61 miles per hour, slightly in excess of the maximum speed permitted on this track, the train was brought to a complete stop in only 2170 feet (R. 188-189).

In view of the above authorities and in the light of the above considerations, Respondent submits that the evidence in the case at bar is such as to permit a fair inference that if there had been a sufficient headlight on the engine to have permitted the engineer to see decedent at the required 800 foot distance, and the engineer had immediately applied his brakes, decedent would have had both sufficient warning and time to have jumped off the speeder and escaped injury, and in fact the speed of the train might well have been reduced to the speed of the speeder and the collision would not have occurred.

Petitioner's argument that warning blasts of the whistle were given in plenty of time so that decedent could have jumped out of the way (Petitioner's Brief, p. 14) is absurd. The testimony of the fireman was that the whistle, the application of the brakes, and the explosion caused by the col-

lision all seemed to come together (R. 43-44). The boy who saw the accident from the field testified that the engine was only 50 feet from the speeder when the whistle was blown (R. 79-80). Obviously this would not give a man time to jump. It would hardly give him time to turn his head.

Respondent respectfully submits that under the evidence in this case the causal connection between the violation by the Petitioner of the Boiler Inspection Act with reference to headlights, and the death of the decedent, was a matter of fair inference and constituted a question of fact for the jury. Both decedent and the engineer were deprived by this defective headlight of a number of precious seconds during which the one could have leaped to safety and the other could have greatly reduced the speed of his train and taken other steps to avoid the fatal accident. Respondent urges that the evidence in this case leads to the fair conclusion that if Petitioner had not violated the law decedent would not have been killed.

C.

The negligence of decedent was not the sole proximate cause of decedent's death, and this issue was properly submitted to the jury.

Contributory negligence of decedent is no defense under the Federal Act.

Title 45, Chapter 2, Section 53—Contributory Negligence:

> "In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of the chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee

> may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; *provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.*" (Italics ours.)

Neither is assumption of risk a defense.

Title 45, Chapter 1, Section 7—Assumption of risk by employees:

> "Any employee of any common carrier engaged in interstate commerce by railroad who may be injured by any locomotive, car, or train in use contrary to the provisions of this chapter shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge."

Petitioner contends, however, that the negligence of decedent was the sole proximate cause of his death, and that Petitioner is therefore not liable under the Federal Boiler Inspection Act (Petitioner's Brief, pp. 15 and 16). In support of this contention Petitioner cites the following United States Supreme Court and Federal Court cases:

Unadilla Railway Co. v. Caldine (1928), 278 U. S. 139, 49 S. Ct. 91, 73 L. Ed. 224.

Davis v. Kennedy (1924), 266 U. S. 147, 45 S. Ct. 33, 69 L. Ed. 212.

Frese v. Chicago, Burlington and Quincy R. R. Co. (1923), 263 U. S. 1, 44 S. Ct. 1, 68 L. Ed. 131.

Great Northern Ry. Co. v. Wiles (1916), 240 U. S. 444, 36 S. Ct. 406, 60 L. Ed. 732.

McCalmont v. Pennsylvania Co. (D. C. Ohio 1921), 273 Fed. 231, 283 Fed. 736, Cert. denied 260 U. S. 751, 43 S. Ct. 250, 67 L. Ed. 495.

Southern Ry. Co. v. Gray (1916), 241 U. S. 333, 36 S. Ct. 558, 60 L. Ed. 1030.

Chicago, Milwaukee & St. Paul Ry. Co. v. Coogan (1926), 271 U. S. 472, 46 S. Ct. 564, 70 L. Ed. 1041.

Boghich v. Louisville & N. R. Co. (C. C. A. Fla. 1928), 26 F. (2d) 361.

Southern Ry. Co. v. Youngblood (1932), 286 U. S. 313, 52 S. Ct. 518, 76 L. Ed. 1124.

It is Respondent's contention that some of these cases are distinguishable on their facts from the case at bar, and that the rule of sole proximate cause established in the rest of the cases is so limited as to have no application to the case at bar. A brief analysis of the cases will make this clear.

In the *Southern Ry. Co. v. Gray* and *Chicago, Milwaukee & St. Paul Ry. Co. v. Coogan* cases, recovery was denied on the ground that no negligence was shown on the part of the railroad company. Another case to the same effect not cited by Petitioner in its Brief is the case of *Atlantic Coast Line v. Davis* (1929), 279 U. S. 34, 49 S. Ct. 210, 73 L. Ed. 601.

The *Unadilla Railway Co. v. Caldine, Davis v. Kennedy, Southern Ry. Co. v. Youngblood* and *Boghich v. Louisville & N. R. Co.* cases, all involved violation by decedent of specific train orders regarding the meeting or passing of other trains. Other cases to the same effect not cited by Petitioner in its Brief are:

Unadilla Valley Ry. Co. v. Dibble (C. C. A., N. Y. 1929), 31 F. (2d) 239, Cert. denied 280 U. S. 565, 50 S. Ct. 25, 74 L. Ed. 618.

Bradley v. Northwestern Pac. R. Co. (C. C. A. Cal. 1930), 44 F. (2d) 683.

St. Louis Southwestern Railway Co. v. Simpson (1932), 286 U. S. 346, 52 S. Ct. 520, 76 L. Ed. 1152.

McDonald v. Great Northern Ry. Co. (1926), 166 Minn. 87, 207 N. W. 194, 198.

See also *Southern Ry. Co. v. Hylton* (C. C. A. Tenn. 1930), 37 F. (2d) 843, Cert. denied 281 U. S. 745, 50 S. Ct. 351, 74 L. Ed. 1158.

Pere Marquette Ry. Co. v. Haskins (C. C. A. Mich. 1933), 62 F. (2d) 806.

These cases all involve direct violations by the injured employee of express orders in respect to immediate and particular dangers. In the case at bar, on the other hand, the only violation claimed is that of a general safety rule. As will be pointed out later in this Brief, the courts have made a clear distinction between the two types of violations.

In the *Frese v. Chicago, Burlington & Quincy R. R. Co.* case, a statute of the state in which the accident occurred made it the positive and exclusive duty of the engineer to stop his train at a certain distance from a crossing with other railroad tracks, and to ascertain that the way was clear before proceeding. He violated this statute and was killed in the resulting collision. Here again there was a direct violation of a specific statute relating to a particular danger as distinguished from a general safety rule.

In the *Great Northern Ry. Co. v. Wiles* case, a train was stopped when a draw bar was pulled out. It was the duty of plaintiff's intestate, the rear brakeman, to protect the rear of the train. The engineer signalled him to go back and

do so. He did not go back, and was killed in the resulting rear end collision. In denying plaintiff recovery, the Court stated that the pulling out of the draw bar created a condition which demanded instant performance of duty by deceased, thus indicating that the defective draw bar merely created a dangerous condition and that the negligence of deceased was the proximate cause of the accident. That this was the basis for the Court's decision is definitely stated in the subsequent case of *Union Pacific R. R. Co. v. Hadley* (1918), 246 U. S. 330, 38 S. Ct. 318, 62 L. Ed. 751, where the Court, in allowing recovery in a case of almost the same fact situation with the added factor that there was evidence of negligence on the part of other employees of the company, said:

> "In *Great Northern Ry. Co. v. Wiles*, 240 U. S. 444, it appeared that the only negligence connected with the death was that of the brakeman who was killed."

In the case of *McCalmont v. Pennsylvania Co.*, plaintiff's intestate, an inspector, went between two cars standing on a storage track for removal to the repair shop, to shorten a chain coupling. He failed to put out a blue flag as expressly required by the rules of the company. Another car was kicked onto the track and by reason of the absence of the coupler, he was killed. Plaintiff was denied recovery under the Safety Appliance Act upon the double ground that the company was not "using, holding, permitting to be used or held on its line" the defective car at the time, and that the failure of deceased to put out the warning flag, rather than the defective condition of the car, was the proximate cause of the accident.

It is to be noted that in both the *Great Northern Ry. Co. v. Wiles* and *McCalmont v. Pennsylvania Co.* cases, the de-

ceased employee was aware of the earlier negligence or violation of the Safety Appliance Act on the part of the employer, and that subsequent thereto he failed to comply with a rule of the employer providing for a specific contingency. That this distinction is sound and has been recognized by the Federal Courts is brought out in the case of *Paster v. Pennsylvania R. R.* (C. C. A. N. Y. 1930), 43 F. (2d) 908, in which the Court said:

> "* * * such cases as Great Northern Ry. Co. v. Wiles, 240 U. S. 444, 36 S. Ct. 406, 60 L. Ed. 732, and McCalmont v. Pennsylvania R. Co., 283 F. 736 (C. C. A. 6), though often cited as exceptions, do not strictly involve contributory negligence at all, because in those the servant was aware of the earlier fault, and his subsequent disregard of the rule brought the case among those where the last wrongdoer is wholly liable, if he has had opportunity to shape his conduct upon existing facts, however caused."

The same distinction can be made in the *Boghich v. Louisville & N. R. Co.* case.

The case at bar is clearly distinguishable from these three cases. In the case at bar, up to the time of his death or at least until a second or two before his death, decedent had no intimation whatsoever of the defectiveness of the headlight on the engine of the train which overtook and killed him. His violation of one of the general safety rules of Petitioner in failing to secure a line up of trains shortly prior to the fatal accident, at most constituted a concurring act of contributory negligence.

It will be seen from the above brief analysis of the cases cited by Petitioner in support of its contention that the negligence of decedent was the sole proximate cause of his death, that all of the cases are plainly distinguishable from

the case at bar. Those in which no negligence on the part of the railroad company was shown are clearly not in point. The decision in the *Great Northern Ry. Co. v. Wiles* case was based upon the ground that the negligence of the railroad company merely created a dangerous condition which had no connection with the accident and that in effect there was no negligence on the part of the railroad company. The *Wiles* case therefore also is not in point. The decision in the *McCalmont* case was based upon the double ground that the defective car was not in use at the time of the accident, and that even assuming that the car was in use it merely created a dangerous condition and that decedent's failure to put out a warning flag was the proximate cause of the accident. In both the *Great Northern Ry. Co. v. Wiles* and *McCalmont v. Pennsylvania Co.* cases, the negligence of the decedent was a highly efficient intervening act, as distinguished from a concurring act of negligence. The other cases all involved a direct violation by the injured employee of an *express order or statute in respect to an immediate and particular danger*, as distinguished from a violation of a *general safety* rule.

That the courts have recognized a distinction between the two types of violations, and have definitely limited the application of the sole proximate cause rule to the situation involving the former type of violation, is well brought out in the case of *Miller v. Central R. Co. of New Jersey* (C. C. A. N. Y. 1932), 58 F. (2d) 635, Cert. denied 287 U. S. 617, 53 S. Ct. 18, 77 L. Ed. 536. The facts of this case disclose that plaintiff's intestate, the engineer of an inferior train, was killed when his train collided with an opposing superior train. The fireman was operating the inferior train at the time of the accident, and failed to see the oncoming train.

If the engineer had been looking out of the left side of the cab he would have seen the other train. A rule of the company required inferior trains to keep out of the way of opposing superior trains. The conductor violated this rule by ordering decedent to proceed without finding out whether there was any opposing train. Another rule of the company provided that both the conductor and engineer are responsible for the safety of the trains and the observance of its rules. In affirming judgment for plaintiff, the Court said:

> "We assume for argument that he was negligent in this last respect, and that except for the statute the plaintiff could not recover. But it seems to us that the situation involved two concurring acts of contributory negligence, and was not one where the employee has disobeyed a rule and is 'primarily' responsible. * * * All these decisions involved specific precautions for specific occasions; the stopping of a train at a given spot until another passed, or until the track was clear. *No doubt the doctrine is not confined to train movements (Paster v. Pennsylvania* R. R., 43 F. (2d) 908 (C. C. A. 2); *but it does not seem to us to extend to rules generally enjoining caution, or responsibility, in spite of some of our language looking to the contrary in Reynolds v. New York O. and W. R. Co.* (C. C. A.), 42 F. (2d) 164. *If it did, an employer could revive the defense of contributory negligence by imposing as an affirmative duty such care as is appropriate to the situation, which is just what the common law makes a condition upon recovery. The statute was designed to end that defense and cannot be so conveniently avoided; the doctrine does not in our judgment apply, except when more definite commands are given to meet more definite situations; how definite we need not decide."* (Italics ours.)

Respondent calls particular attention of this Court to the argument of the Court in the *Miller* case that if the violation of any and every rule of the railroad company would prevent recovery, or if the railroad company were permitted to make rules imposing upon employees certain "primary" duties, then in practical effect the defense of contributory negligence, which was abolished by the statute, would be revived, and the statute would be avoided. It will be recalled that in the case at bar hundreds of rules, letters, instructions and circulars were sent out to decedent (R. 120-122).

The limited application of the sole proximate cause rule is also well brought out in the recent United States Supreme Court case of *Rocco v. Lehigh Valley R. Co.* (1933), 288 U. S. 275, 53 S. Ct. 343, 77 L. Ed. 743, the facts of which are strikingly similar to those of the case at bar. In the *Rocco* case, plaintiff's intestate, a track inspector, while riding a track inspection tricycle, was killed in a head-on collision with a passenger train on a single track on a blind curve about one mile north of Ithaca. Decedent's schedule required him to leave Ithaca at 3:30 P. M. The colliding train, due at Ithaca at 12:23 P. M., was over three hours late, due to washouts. It had left the next village—eight miles north of Ithaca—at 3:14 P. M. Decedent could have ascertained this fact by asking the operator about lineups. He knew of the company rule requiring him to ask for lineups because he had been reprimanded once or twice before for not having done so. There was a verdict for plaintiff, which was reversed by the Circuit Court of Appeals on the theory that decedent's negligence was the primary or sole proximate cause of the accident. In reversing the Circuit Court of Appeals, the United States Supreme Court said of the sole proximate cause cases:

> "These were cases where a member of a train crew was killed as a result of disregarding orders to wait at a given point until a train moving in the opposite direction had passed. In each of them the decedent's negligence was the proximate and efficient cause of the accident; in each it was sought to show that the fatality was in part due to alleged negligence of some other employee in omitting to give the decedent an order which would have reminded him of the orders previously given and by which he was bound."

The Court went on to say that if the company rule had forbidden decedent to leave Ithaca under circumstances such as inquiry by him would have disclosed, there might be some basis for applying the sole proximate cause rule, but that his infraction of the rule in question could not in any proper sense be considered the primary cause of the accident.

Respondent submits that the case at bar is so parallel on its facts to the *Rocco* case that the latter is controlling over it. In both cases, decedent was rightfully on the track, riding a speeder or tricycle in the performance of his duties. In both cases, decedent neglected to secure a lineup of trains before leaving the station. In both cases, decedent was struck by a delayed train. In the *Rocco* case, the train hit decedent head-on in the daytime on a blind curve. In the case at bar, decedent was struck from behind in the night time on a straight track. In the *Rocco* case, the Court held that it was the duty of the motorman to keep a lookout and give warning in places where the view of one who might be expected to be on the track was shut off and the view obstructed. If the operator of a tricycle on a blind curve on the track is entitled to warning of the approach of a delayed train in the daytime, surely by the same criterion the operator of a speeder on a straight track is at least entitled to

have the headlights of a delayed train approaching from behind in the night time in proper working order so that he may be given a warning which will approximate as nearly as possible that accorded the former operator.

Upon the above considerations and in view of the above authorities Respondent submits that the sole proximate cause rule exemplified by the *Unadilla Railway Co. v. Caldine* and *Davis v. Kennedy* cases is inapplicable to the case at bar. As the Court in the *Miller v. Central R. Co. of New Jersey* case stated, the rule cannot be extended to include violations of *general caution* or *safety rules,* but must be limited to violations of *specific orders or commands given to meet definite and particular situations.* If it were otherwise, the old common law defense of contributory negligence, which the statute relating to safety appliances was designed to eliminate, would again be revived.

D.

Decedent was entitled to the warning which a proper headlight would have afforded him, and the so-called "No Duty to Warn" rule urged by Petitioner is not applicable to the case at bar.

Petitioner contends that it owed decedent no duty to look out for or warn him of the approach of its train (Petitioner's Brief, pp. 16 and 17). In support of this contention, Petitioner cites the following cases:

Connelley v. Pennsylvania R. Co. (C. C. A. 1915), 228 Fed. 322.

Aerkfetz v. Humphreys (1892), 145 U. S. 418, 12 S. Ct. 835, 36 L. Ed. 758.

Chesapeake & Ohio Ry. v. Nixon (1926), 271 U. S. 218, 46 S. Ct. 495, 70 L. Ed. 914.

Bernola v. Pennsylvania R. Co. (C. C. A. 1933), 68 F. (2d) 172.

Atlantic Coast Line R. Co. v. Driggers (1929), 279 U. S. 787, 49 S. Ct. 490, 73 L. Ed. 457.

May v. Chicago, M. & St. P. Ry. Co. (1920), 147 Minn. 310, 180 N. W. 218.

Greisch v. Minneapolis, St. P. & S. S. M. Ry. Co. (1924), 160 Minn. 83, 199 N. W. 517.

Dozier v. Missouri Pac. R. Co. (1928), 176 Ark. 651, 3 S. W. (2d) 678.

Norfolk & W. Ry. Co. v. Smith (1929), 152 Va. 165, 146 S. E. 268.

Cincinnati, N. O. & T. P. Ry. Co. v. Swann's Adm'x (1914), 160 Ky. 458, 169 S. W. 886.

Rowe v. Chesapeake & Ohio Ry. Co. (1926), 215 Ky. 525, 286 S. W. 784.

In the *Connelley v. Pennsylvania R. Co.* and *Aerkfetz v. Humphreys* cases, the injured employees were track walkers or track repair men who were working on terminal tracks or in railway yards. Obviously, these cases present an entirely different situation than that involved in the case at bar. As the Court in the *Aerkfetz* case said:

> "The ringing of bells and the sounding of whistles on trains going and coming, and switch engines moving forwards and backwards, would have simply tended to confusion."

See *Southern Ry. Co. v. Colonna* (C. C. A. Va. 1933), 64 F. (2d) 237, Cert. denied 289 U. S. 762, 53 S. Ct. 795, 77 L. Ed. 1505, where the Court, in discussing the *Aerkfetz* and like cases, said:

"These cases disclose the limited obligation of a railroad to safeguard its employees in a railroad yard, where it is not practicable to give notice of the approach of engines and cars constantly moving back and forth and where experienced employees, thoroughly aware of the attendant dangers, are expected to take reasonable precautions for their own safety."

See also *Colasurdo v. Central R. R. of New Jersey*, (C. C. S. D. New York 1910), 180 Fed. 832.
Lehigh Valley R. Co. v. Doktor (C. C. A. N. J. 1923), 290 Fed. 760.

In the *Chesapeake & Ohio Ry. v. Nixon* case, the action was brought under the Federal Employers' Liability Act. Recovery was denied, not on the ground that the railroad company owed plaintiff's intestate no duty to look out for or warn him of the train's approach, but on the ground that plaintiff's intestate assumed the risk. Since assumption of risk is not a defense under the Federal Boiler Inspection Act, U. S. C. A., Title 45, Chapter 1, Section 7, this case can have no application to the case at bar.

In the *Bernola v. Pennsylvania R. Co.* case, decedent, a member of a section gang of four men, was struck from behind by a train while he was working on the track. The Circuit Court of Appeals, in affirming judgment for defendant, refused to follow the principle of law laid down in the *Rocco* case (See supra, pp. 31, 32) on the theory that that principle of law must be confined to "blind curve" cases, and that inasmuch as the accident in the *Bernola* case happened on a long, open, unobscured curve on which a workman could see an approaching train nine hundred feet away, the case was controlled by the line of cases exemplified by

the *Connelley v. Pennsylvania R. Co.* and *Aerkfetz v. Humphreys* cases.

Although not cited by Petitioner in its Brief, Respondent calls attention to another recent case, the facts of which are somewhat similar to those of the *Bernola* case. The case is that of *Thomson v. Downey* (C. C. A. Ill. 1935), 78 F. (2d) 487, Cert. denied 56 S. Ct. 154, 80 L. Ed. 125. The facts of the case disclose that decedent, a section foreman, was riding a velocipede around a three degree curve in a northerly direction on the right hand track. The temperature was twenty-five degrees below zero. Decedent had on an overcoat and also a cap with ear flaps. The colliding train, also going north, was more than three hours behind schedule. The engineer could not see more than three hundred feet ahead because he was riding the outside curve. The fireman was not looking out his window. It was daytime, and decedent could have seen the approaching train for a distance of four thousand feet by looking across the curve, which was unobstructed by trees or buildings. The engineer was whistling for a crossing at the time. Action was brought under the Federal Employers' Liability Act. There was a verdict for plaintiff. In reversing and remanding the case, the Circuit Court of Appeals held that the facts did not present an unusual or extraordinary condition such as was present in the *Rocco* case, that decedent being a section foreman, was under duty to look out for approaching trains, and that he assumed the risk appertaining thereto.

It is Respondent's contention that the Circuit Court of Appeals in the *Bernola* and *Thomson* cases erred both in so strictly limiting the doctrine of the *Rocco* case, and in extending the rule of the *Connelley* and *Aerkfetz* cases to apply to accidents occurring outside of terminals and railroad

yards. The decisions, like the *Chesapeake & Ohio Ry. v. Nixon* case, should have been placed on the ground that decedent assumed the risks of his employment rather than on the ground that the railroad company owed him no duty to watch out for and give him warning. However, even assuming that the *Bernola* and *Thomson* cases were correctly decided, it does not follow that the case at bar falls within the rule of those cases rather than within that of the *Rocco* case. The Court in the *Bernola* case distinguished the fact situation there present from that in the *Rocco* case in this, that in the *Bernola* case the accident happened on "a long, open, unobscured curve on which a workman could see an approaching train nine hundred feet away." But the accident in the case at bar happened at night. Decedent could not see the train approaching because of the darkness, and because he was facing in the same direction as the train was going. He could not hear it because of the noise of his own speeder. His predicament is comparable to that of decedent in the *Rocco* case. In that case, decedent, proceeding toward the train in the daytime, had no warning because he was on a blind curve. In the case at bar, decedent, proceeding ahead of the train, had no warning because it was dark. In the *Rocco* case, the railroad company was negligent because it failed to keep a proper lookout for decedent so that he could have been warned by whistle in time to jump. In the case at bar, Petitioner failed to have the headlight on its engine burning bright enough so that decedent could have been warned by the illumination therefrom in time to jump.

That decedent was entitled to the warning which a properly burning headlight would have given him is well brought out in the cases of *Salabrin v. Ann Arbor R. Co.* (1916), 194 Mich. 458, 160 N. W. 552, and *Louisville & N. R. Co. v. Mullin's Adm'x* (1918) 181 Ky. 148, 203 S. W. 1058.

In the *Salabrin* case, plaintiff, with others on a handcar, was overtaken by a train and injured. The accident occurred about 6:30 P. M. There were no lights on either the handcar or the train—the train had been in an accident and the headlight had been broken. There was a verdict for plaintiff. Upon appeal, defendant contended that it owed plaintiff no duty in respect of the headlight. In affirming, the Court said:

> "We do not think that the use of a headlight, whether prescribed by statute or demanded by practice in good railroading, should be held to be for the benefit of the public only, and not for the benefit of the employees of the railroads. Such employees are obliged constantly to be upon the right of way and in the yards of the railroad companies, and after dark the use of a headlight is to them one of the highest guaranties of safety to life and limb."

In the *Louisville & N. W. Co.* case, plaintiff's intestate, a signal maintenance man, had 20 miles of track between Berea and Sinks to patrol. He lived at Snyder, which was five miles from Berea and 15 miles from Sinks. There was a tunnel one mile north of Sinks and 14 miles from Snyder. He left his home at Snyder heading for Sinks at 9:00 o'clock A. M. on a tricycle. A few minutes before he was killed he was seen in a telephone booth immediately south of the tunnel. When he reached the mouth of the tunnel on his tricycle, he was struck by a fast passenger train going north. His body was found in the tunnel about 60 feet from its mouth. The accident happened at 4:28 P. M. on December 17. It was dark and rainy. The trial court instructed the jury that it was the duty of the railroad company to keep and maintain a headlight, properly lighted, upon the front of its engine when running in the dark, and if they believed

from the evidence that the deceased at the time he was struck and killed, was upon defendant's tracks, in the usual course of his employment, and that it was dark, and the defendant's agents and employees in charge of the engine negligently failed to have the headlight burning in the usual and customary manner, and that by reason thereof plaintiff's intestate was killed, they should find for plaintiff. There was a verdict for plaintiff. In affirming, the appellate Court said:

"Though the train operators testified to the contrary, there was evidence to the effect that the headlight on the engine was not burning at the time of the accident. * * * It may be conceded that a railroad company does not owe to an employee such as deceased the duty to run its trains at a reasonable speed, or to give warning of their approach, or to keep a lookout. It may further be conceded that a railroad company does not owe to a trespasser the duty of maintaining a headlight on its engine. Here, however, the deceased was neither a trespasser nor a bare licensee, but an employee who was rightfully on the track. While it is true that it was his duty to exercise ordinary care to learn of the approach of trains and to keep out of the way, yet, the nature of his employment and the conditions under which he worked were such that he necessarily had to be on the track when trains were approaching. In the daytime it would be an easy matter to see the train, but if it was dark, and no headlight was maintained, he would be deprived of the best, and in many instances the only, means of seeing the train. In view of the fact that the law casts on such an employe the duty to discover the train and keep out of its way, it seems to us that there is a corresponding duty on the part of the railroad company to furnish the means by which an approaching train may be discovered. * * * We therefore conclude that the trial court did not err in holding that the company owed to the deceased the duty of main-

taining a headlight on its engine, and, in authorizing a recovery if its failure to do so was one of the contributing causes of his death.

* * * * * *

Of course the doctrine of assumed risk does not apply if the defendant was guilty of negligence in not maintaining a headlight, for the servant never assumes the risk of the master's negligence unless he knows of the negligent act and appreciates the danger or the negligent act and consequent danger are so obvious that a person of ordinary prudence in his situation would have observed the one and appreciated the other. Here there was not slightest opportunity to observe the absence of a headlight and appreciate the danger. On the contrary, the danger itself was created and concealed by the negligent act of the defendant."

See also

Fairport R. Co. v. Meredith (1934), 292 U. S. 589, 54 S. Ct. 826, 78 L. Ed. 1446.

Swinson v. Chicago, St. P., M. & O. R. Co., (1935), 294 U. S. 529, 79 L. Ed. 1041.

The Minnesota cases and all but one of those from other state courts cited by Petitioner in support of its contention that the case at bar falls within the rule that a railroad company owes an employee on the tracks no duty to look out for or warn him of the approach of a train, are all distinguishable from the case at bar.

In the Minnesota case of *May v. Chicago, M. & St. P. Ry. Co.*, plaintiff's intestate was run over by a train at 11:30 P. M. The evidence was clear that the engineer was on the lookout, and whistled and applied his brakes as soon as the outline of the speeder showed up in the light. The engineer

testified that he did not see anyone on the speeder. No claim was made of a defective headlight, and there was nothing in the evidence to show that the railroad company was negligent in any other respect.

In the Minnesota case of *Greisch v. Minneapolis, St. P. & S. S. M. Ry. Co.,* plaintiff's intestate, a section hand, was struck and killed by a passenger train while unloading rail braces from a handcar. The engineer of the train testified that he had his automatic bell ringing; that he saw decedent and his fellow workers when about 1700 feet away and gave the crossing signal, which was the usual signal to warn sectionmen; that when he was about 300 or 400 feet from the men he saw they were not moving off the track and began to give the danger signal; that one of the men looked up and got off the track but that decedent did not move.

The Arkansas case of *Dozier v. Missouri Pac. R. Co.* and the Virginia case of *Norfolk & W. Ry. Co. v. Smith* both involved actions brought under the Federal Employers' Liability Act. In both cases, plaintiff was denied recovery on the ground that he assumed the risk.

In the Kentucky case of *Cincinnati N. O. & T. P. Ry. Co. v. Swann's Adm'x,* deceased, acting foreman of a crew of men putting in some water columns, was killed by a passing train as he was looking down into a pit. He could have used two or three places which would have been safe. In reversing judgment for plaintiff, the appellate Court said:

> "To the employe like Swann, whose duty it is to look out for trains and protect the track, the company does not owe any of the duties assigned as negligence in this case. It only owes him the duty of exercising ordinary care to protect him from danger after his peril is dis-

> covered, and there is no claim in this case that the collision with Swann could have been prevented after his danger was discovered. What duties railroad companies owe to other classes of employes, engaged on or about the track, we need not determine, as such an inquiry would not be pertinent to the case in hand."

In the Kentucky case of *Rowe v. Chesapeake & Ohio Ry. Co.*, plaintiff's intestate, a section foreman, was on his way home with his crew on a handcar. On a curve the handcar collided with a motor car, carrying a load of railroad officials, coming in the opposite direction, and the section foreman was killed. In running around the curve the section foreman had failed to comply with Rule 10, which provided that unless the track is seen or known to be clear, movement must be made under full flag protection. In denying relief under the Federal Employers' Liability Act, the Court said:

> "The primary negligence causing the collision was that of the section foreman in running his handcar around Ben Bow curve without complying with rules 10 and 13.' As his negligence was the primary cause of the trouble, there can be no recovery by him or by his wife or children under the federal liability statute. *Frese v. Chicago, Etc., R. Co.*, 44 S. Ct. 1, 263 U. S. 1, 68 L. Ed. 131."

It is to be noted that the Court in the *Rowe* case based its decision on the holding of the *Frese v. Chicago, Burlington & Quincy R. R. Co.* case. It will be remembered that that case involved a direct violation of a specific statute relating to a particular danger as distinguished from a general safety rule. It is Respondent's opinion that the Court in the *Rowe* case overlooked the well-defined distinction between the two types of violations, and that its decision was erroneous.

Respondent submits that the cases cited by Petitioner for the proposition that a railroad company owes an employee on the tracks no duty to look out for or warn him of the approach of a train, are not applicable to the case at bar. It is Respondent's opinion that the well-considered cases limit this rule to accidents occurring in terminals and railroad yards, where the ringing of bells and sounding of whistles would only tend to increase confusion. If there is any basis for the rule, it lies in the fact that in such situations the employee must be held to have assumed the risks of such employment. Even if it be conceded that the rule has been extended by such cases as *Chesapeake & Ohio Ry. v. Nixon*, *Bernola v. Pennsylvania R. Co.* and *Thomson v. Downey* to apply to accidents occurring on the main tracks, the basis of the rule still lies in the fact that the employee must be held to have assumed the risk. Since assumption of risk is no defense to an action brought under the Federal Boiler Inspection Act, the rule, even as extended, cannot be applicable to the case at bar.

E.

The case was properly tried and submitted to a jury and judgment of the Minnesota Supreme Court herein should be affirmed.

In summary, Respondent submits that there is ample evidence, when taken with the inferences which the jury might reasonably derive therefrom, for the jury to decide that there was a violation by Petitioner of the Federal Boiler Inspection Act in respect to headlights, and that there was a causal connection between that violation and the death of decedent. Respondent further submits that upon

the facts presented in the case, neither the sole proximate cause rule, nor the no duty to warn rule relied upon by Petitioner are applicable to the case at bar.

Respondent therefore respectfully asks that the judgment of the Supreme Court of the State of Minnesota be affirmed.

Respectfully submitted,

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